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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM WASHINGTON, Defendant and Appellant.	B267300 (Los Angeles County Super. Ct. No. LA070312)

APPEAL from an order of the Superior Court of Los Angeles County, Gregory A. Dohi, Judge. Dismissed.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Chung L. Mar and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

William Washington appeals an order, entered while his appeal from the judgment of conviction was pending, denying in part his petition for recall of sentence under Proposition 47, the Safe Neighborhoods and Schools Act, Penal Code section 1170.18.[1] Because the trial court lacked jurisdiction to rule on Washington's Proposition 47 petition during the pendency of his appeal from the judgment, the order did not affect his substantial rights and is not appealable. Therefore, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On August 30, 2013 a jury convicted Washington on multiple counts of second degree burglary and theft of identifying information and one count each of grand theft and possession of a controlled substance. The jury also found true an allegation that Washington had served a prior prison term. The trial court sentenced Washington to an aggregate prison term of 24 years 8 months. On June 2, 2014 Washington filed a notice of appeal.

On May 19, 2015, while his appeal was pending in this court, Washington filed a petition for recall of his sentence under Proposition 47. Washington asked the trial court to reclassify eight of his felony convictions as misdemeanors, five of which the People conceded were eligible for reclassification. On June 17, 2015 the trial court granted the petition to reclassify all but one of the counts. At the continued resentencing hearing on August 31, 2015, the court confirmed it had denied the petition as to that

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[1] Statutory references are to the Penal Code.

count. On September 2, 2015 Washington filed a notice of appeal from the August 31, 2015 judgment and sentence.

On August 23, 2016 we filed our opinion in Washington's appeal from the judgment of conviction affirming the judgment in part and reversing it in part. (*People v. Washington* (Aug. 23, 2016, B257234 [nonpub. opn.] (*Washington I*).) We remanded the case to the trial court with directions, among other things, to exercise its discretion to impose or strike a one-year prior prison term enhancement under section 667.5, subdivision (b). (*Washington I*, *supra*, at p. 11.) On September 28, 2016 Washington filed a petition for review in the Supreme Court. On November 22, 2016 the Supreme Court denied the petition for review.

DISCUSSION

On June 17, 2015, when the trial court ruled on Washington's petition, the court lacked jurisdiction to hear it. (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 924-925, 929 (*Scarbrough*); see *People v. Bradshaw* (2016) 246 Cal.App.4th 1251, 1257 [defendants are limited "to the statutory remedy, set forth in section 1170.18, of petitioning for recall of sentence [citation] or applying for designation of felony convictions as misdemeanors [citation], as appropriate, in the trial court once the judgment is final"]; accord, *People v. Noyan* (2014) 232 Cal.App.4th 657, 672.)

As the court explained in *Scarbrough*, the general rule is that the trial court may not issue an order affecting a judgment while an appeal is pending. This rule protects the jurisdiction of the appellate court by preserving the status quo "so that an appeal is not rendered futile by alteration." (*Scarbrough*, at

p. 923.) The court in *Scarbrough* concluded that nothing in Proposition 47 creates an exception to this general rule or suggests the voters intended that the defendant must immediately seek, or the trial court must immediately grant, relief under Proposition 47. (*Ibid.*) The court explained that, to the contrary, Proposition 47 gives a defendant three years from the effective date of the initiative, or longer on a showing of good cause, to petition for relief. (*Id.* at p. 928; see § 1170.18, subd. (j).) The court in *Scarbrough* noted that allowing a trial court to hear a petition under Proposition 47 while an appeal was pending also would not result in any judicial economy savings: "[C]oncurrent jurisdiction would not support judicial economy. Our efforts to review the initial judgment may be rendered futile; we may be asked to review conflicting judgments, each with different errors to be corrected; and the trial court may be asked to effectuate a remittitur against a judgment that has since been modified. These scenarios would lead to chaos, confusion, and waste—not judicial economy. Additionally, there is nothing that indicates judicial economy was even contemplated by the voters." (*Scarbrough* at p. 928.)

Because the trial court did not have jurisdiction to consider Washington's petition for resentencing under Proposition 47 during the pendency of his appeal, the court's order denying the petition in part did not affect Washington's substantial rights and is not appealable. Therefore, this appeal must be dismissed. (See § 1237, subd. (b); *People v. Behrmann* (1949) 34 Cal.2d 459, 462; *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1208; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1726; see also *People v. Loper* (2015) 60 Cal.4th 1155, 1166 [trial courts' "refusal to act on a defective defense motion for resentencing could not have affected

any legal rights the defendants . . . possessed, and the appellate courts properly dismissed the appeals"].)

Dismissal of this appeal will provide Washington with an opportunity to obtain some of the relief he seeks in this appeal. At the hearings on Washington's petition, the court and counsel expressed some uncertainty about the evidence relating to the count the court concluded was not eligible for resentencing under Proposition 47, including questions about which stolen items related to that specific count and their monetary values.[2] Washington argues in his opening brief that "it is apparent that neither the court nor [the] prosecutor could accurately recall what evidence had been presented at the hearing to support the court's denial of [Washington's] petition as to" that count, and that the court and the prosecutor confused the evidence relating to that count with the evidence relating to another count. Filing a new petition, when the trial court has jurisdiction, will give

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[2] As we stated in *Washington I*, "The People charged Washington with 21 counts arising from incidents occurring on six separate dates. In each of the first five incidents, Washington entered a 24 Hour Fitness gym, stole credit cards and other personal effects from lockers, then used the stolen credit cards to make purchases at various retailers. The sixth incident involved a search of Washington's motel room, in which police discovered cocaine and stolen property." (*Washington I*, *supra*, at p. 1.) The confusion at the August 31, 2015 hearing involved which items of personal property were involved in the count that the court did not reclassify as a misdemeanor, whether the value of those items did not exceed $950, and whether those items were the subject of a different count. In fact, the court had continued the sentencing hearing to allow newly substituted-in counsel "a chance to flesh out whatever issues he feels may be appropriate" regarding the stolen items involved in this count.

Washington, the People, and the trial court an opportunity to review the evidence and sort out which evidence related to which count.

People v. Contreras (2015) 237 Cal.App.4th 868, cited by Washington, is distinguishable. The defendant in that case asked the Court of Appeal to reduce two felony convictions to misdemeanors under Proposition 47 and remand the case to the trial court for resentencing. (*Id.* at p. 891.) The Court of Appeal declined to address the defendant's Proposition 47 argument because doing so would require factual findings "that must be made by the trial court in the first instance." (*Id.* at p. 892.) The court concluded, "In essence, defendant asks this court to designate his offenses as misdemeanors under section 1170.18 in the first instance, rather than review the trial court's ruling on his petitions to recall his sentence. That is not our role." (*Id.* at pp. 891-892; see *People v. Awad* (2015) 238 Cal.App.4th 215, 221-222 [reducing convictions from a felony to a misdemeanor is "a task" that Proposition 47 "[m]anifestly . . . vests with the trial court"].) Washington is not asking this court to grant him relief under Proposition 47 in the first instance. He is asking this court for appellate review of an order the trial court had no jurisdiction to make.[3]

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[3] In *People v. Awad*, *supra*, 238 Cal.App.4th 215 the court directed "a limited remand to the trial court to hear a postconviction motion to recall a sentence under section 1170.18." (*Id.* at p. 222.) Washington does not ask for that remedy here. In any event, *Awad* is distinguishable. In *Awad* the trial court declined to grant the defendant's petition under Proposition 47 because the trial court ruled it lacked jurisdiction to hear the petition while the case was on appeal. (*Id.* at p. 219.) "*Awad*

DISPOSITION

The appeal is dismissed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

KEENY, J.*

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does not apply . . . where the trial court granted defendant's petition despite the pending appeal and without any direction from this court." (*People v. Scarbrough*, *supra*, 240 Cal.App.4th at p. 929, fn. 5.)

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.